IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

74-520

ERNEST L. MONTANYE, former Superintendent of Attica Correctional Facility, et al.,

*Petitioners,*

*against*

RODNEY R. HAYMES,

*Respondent.*

## REPLY BRIEF FOR PETITIONERS


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## REPLY BRIEF FOR PETITIONERS

### A.

Defendants agree with plaintiff Haymes (Res. Br. at 6-9) that with regard to his transfer claim, the District Court properly treated defendants' motion as a motion to dismiss, since no evidentiary material was submitted concerning that claim and defendants did not answer the complaint. Accordingly, at no point in the proceedings have defendants alleged the reason for the transfer nor have they made any claim regarding what material, if any, appears in Haymes' files regarding the transfer, as plaintiff now asserts (Res. Br. at 24, 27-28).*

* Haymes devotes a large portion of his brief to the propositions that his *pro se* complaint should be liberally construed and his allegations treated as true (Res. Br. at 6-14). Defendants treated his allegations as true for the purposes of their motion to dismiss. Although Haymes' complaint was *pro se*, he retained counsel at least seven months prior to the District Court's decision. No motion was made to amend the complaint.

Haymes further suggests that there is an issue in this case as to whether he received disciplinary confinement or the loss of good time credits in connection with the transfer (Res. Br. at 26-29). This is a startling proposition to be injected by plaintiff at this penultimate stage of the proceedings since the postulated issue in this case has always been limited to the constitutional significance, if any, of a transfer between two maximum security prisons without a hearing and with no imposition of disciplinary confinement or good time loss. Indeed, this case would not be before this Court had either penalty attached. According to the Department's own regulations in June, 1972 neither penalty could be imposed unless the inmate was first afforded a disciplinary hearing. It is certainly long since conceded that Haymes had no hearing at all.

Finally, Haymes blithely asserts that defendants have "abandoned" the defense of good faith immunity to the request for monetary damages (Res. Br. at 13 n. 12). This Court's recent decisions establish that the defense is one to be pleaded and proved, rather than asserted on a motion to dismiss. *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974). See *Wood* v. *Strickland,* 420 U.S. 308 (1975). Accordingly, if plaintiff prevails in this Court and the case is remanded, defendants will raise, and are in no respect precluded from raising, the defense of good faith immunity in their answer.

**B.**

Recognizing that the due process protection of the Fourteenth Amendment is inapplicable unless the State has affected a liberty or property interest, Haymes concedes that he has no property interest in his retention at any particular maximum security prison but propounds three possible sources for a protected liberty interest. None of his suggested possibilities withstands constitutional analysis.



1. Haymes first suggests that he has a liberty interest in protection from arbitrary governmental action, asserting that "the touchstone of due process is protection of the individual against arbitrary action of government." *Wolff* v. *McDonnell,* 418 U.S. 539, 558 (1974) (Res. Br. at 16-17). This assertion does not answer the question of whether or not an individual has a liberty interest because the principle logically emerges only after a determination has been reached that a protected interest indeed exists. Thus, the above-quoted portion of *Wolff* necessarily appeared after this Court's holding that the Nebraska inmates had a statutorily-created liberty interest in retention of their good time credits and preceded its analysis of what process was then due. 418 U.S. at 558.

There is, of course, no constitutional right to be free of all unilateral and possibly mistaken action taken by the government. It is only when an individual has a protected interest which is affected by the action that the principle comes into play. Indeed, any other conclusion would mandate that any and all governmental action be preceded by due process, a proposition clearly untenable under this Court's recent decisions. E.g. *Goss* v. *Lopez,* 419 U.S. 565 (1975); *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Morrissey* v. *Brewer,* 408 U.S. 471 (1972). Haymes' proposition, then, merely begs the question of whether or not there is a liberty interest at stake in this case.*

Moreover, Haymes' contention assumes the existence of a factual predicate which if established could compel or prevent the proposed governmental action. However, as discussed in defendants' main brief (Pet. Br. at 8-9), there is no particular set of facts which would entitle Haymes to re-

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* Similarly, the alleged punitive or disciplinary motivation for the transfer is irrelevant to the issue of whether or not a liberty interest exists. Surely the intent or motivation in the minds of governmental employees cannot constitutionally define an inmate's liberty interest.

main at Attica or mandate his transfer to Clinton. Rather, the Legislature of New York has empowered the Commissioner of Corrections to transfer inmates at his discretion. N.Y. Corr. Law § 23(1).

> "Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided . . . no conditions at all, no hearing is required." *Arnett* v. *Kennedy*, 416 U.S. 134, 181 (1974) (WHITE, J. concurring and dissenting) (citations omitted).

The prison authorities were free to transfer Haymes regardless of whether or not it was established that he had violated any prison rules; indeed, they were authorized to transfer him even if it were established that he had violated no rule.

2. Haymes also seeks a liberty interest in the proposition that he suffered a grievous loss as a result of the official action of which he complains (Res. Br. at 17, 20ff). But as defendants have discussed in their main brief (Pet. Br. at 13), the severity of the consequences of the challenged transfer are not part of the analysis for a protected interest; evaluation of grievous loss goes to the "weight" of the claimant's interest, not to its "nature." E.g. *Goss* v. *Lopez*, *supra*, 419 U.S. at 572-576; *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 570-571.

This Court's decisions clearly establish that there is no independent liberty interest created merely because an individual perceives suffered loss at the hands of the government. "The range of interests protected by procedural due process is not infinite." *Roth*, 408 U.S. at 570. For example, in *Roth*, this Court recognized that the teacher's continued employment was of substantial "interest" to him (*id.* at 570), but held that it was not constitutionally significant since no liberty or property interest was implicated. Similarly, injury to one's reputation may be of great importance to the individual affected and may be sufficient to



prevail in a state defamation action, but reputational injury, absent more, does not implicate a liberty or property interest protected by the Due Process Clause. *Paul* v. *Davis*, —— U.S. ——, 44 U.S.L.W. 4337 (March 23, 1976). Claiming grievous loss at the hands of the government begs the question at issue herein. The Due Process Clause does not extend to all governmental action which is adverse or is perceived as adverse by a particular individual but only to that action which affects a protected interest otherwise established.*

3. Haymes further suggests that his Fourteenth Amendment interest derives from the possibility of a notation in his record which might affect his release on parole or the accumulation of statutory good time credits** (Res. Br. at 26-29). See, e.g., *Fano* v. *Meachum*, 520 F. 2d 374, 378, 382 (1st Cir., 1975), *cert. granted*, No. 75-252, —— U.S. ——, 44 U.S.L.W. 3344 (December 8, 1975); *Carlo* v. *Gunther*, 392 F. Supp. 871, 878 (D. Mass. 1975), *vacated and remanded* 520 F. 2d 1293 (1st Cir. 1975). The fact that the transfer may later be taken into account does not mean that an inmate has a protected interest at the time of the transfer; indeed, the claim does not even relate to the procedure attached to the transfer but to mere speculation about future action with regard to an inmate's early release from custody.

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* As defendants have previously argued, the hypothetical adverse consequences propounded by Haymes and the Court of Appeals are not constitutionally cognizable as "grievous loss" (Pet. Br. at 14-17).

** Carried to its logical end, plaintiff's theory of the law would require notice and a hearing before each and every notation in an inmate's file which might be construed as non-complimentary, for example an evaluation of his performance on a job or perhaps even the fact of his placement in one job, such as kitchen duty, rather than another, such as librarian clerk. The consequences of such a theory are absurd and certainly not compelled by the Constitution. See *Fano* v. *Meachum*, *supra*, 520 F. 2d at 381. Cf. *Paul* v. *Davis*, *supra*, 44 U.S.L.W. at 4342.

Haymes was denied parole release on two occasions since his transfer, in July, 1974 and July, 1975 and asserts that he has "no way of knowing" if the Board based its decisions on events related to the transfer (Res. Br. at 28). See *post* at 8.* Haymes further suggests (Res. Br. at 27) that the granting or withholding of good time credits by the Time Allowance Committee (7 N.Y.C.R.R. Parts 261, 262) might be affected by transfer information in his record. The contention that Haymes has a protected interest derived from the possibility of a notation in his prison record does not withstand the constitutional analysis required by this Court's decisions, nor is it supported by facts of which this Court may take judicial notice.

Haymes has no protected interest established by the possibility that his earlier parole applications were affected by a transfer notation.** A decision denying an inmate early release does not deprive him of liberty; his liberty was withdrawn by his conviction. Indeed, he is in no danger of losing liberty, but to the contrary is seeking liberty. Nor has he any legitimate claim of entitlement to parole release. By statutory mandate the decision to parole is discretionary; no particular set of facts can compel a decision by the Board of Parole. N.Y. Corr. Law § 213, 7 N.Y.C.R.R. §§ 1910.5, 1910.15; *Matter of Brigulio* v. *New York State Board of Parole,* 24 N.Y. 21, 26-29, 298 N.Y.S. 2d 704, 708-

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* Haymes met the Board of Parole again on April 6, 1976. He was granted parole and will be released on April 13, 1976. His claim in this action survives since he sought monetary, not declaratory or injunctive relief.

** Haymes is without standing to speculate on the actions of the Time Allowance Committee because he was granted parole release long before a final decision was to be rendered by the Committee as to the granting of good time credits. Haymes' earliest possible statutory release date was 1981. Although the Committee met every three years to review his record, no final decision would have been made until the final meeting, held three months before the statutory release date. 7 N.Y.C.R.R. §§ 260.4(b), 261.3(a)(b), (g), 262.1 (b).



710, 246 N.E. 2d 512, 515-517 (1969); *Matter of Hines* v. *State Board of Parole,* 293 N.Y. 254, 56 N.E. 2d 572 (1944). In short, an inmate has no more than a "unilateral expectation" with respect to his parole release. See *Roth, supra,* 408 U.S. at 577.*

Moreover, the speculation that a transfer notation might affect parole release does not vest an inmate with procedural rights at the time of the transfer. If this Court holds that the Due Process Clause is applicable to parole release proceedings (*Scott* v. *Kentucky Board of Parole, supra*), the transfer can be considered by the Board at the time that it meets; the prisoner then would have the opportunity to challenge or explain the reasons for the transfer. In fact, New York law already requires that an inmate meet with the Board before it renders its decision. N.Y. Corr. Law § 214(4), (5); 7 N.Y.C.R.R. § 1910.10(a).

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* In the interest of brevity, defendants adopt and respectfully refer the Court to the briefs of the party states and United States as *amicus curiae* in *Scott* v. *Kentucky Board of Parole, cert. granted,* No. 74-6438, —— U.S. ——, 44 U.S.L.W. 3358 (December 15, 1975) and *Bradford* v. *Weinstein, vacated as moot,* —— U.S. ——, 44 U.S.L.W. 3372 (December 10, 1975), arguing that an inmate has no liberty or property interest in his parole release.

While defendants argue (*ante* at 6 n.**) that Haymes cannot rely on the possibility of an adverse decision regarding his good time credits, having been released on parole, they note that the above analysis as to parole release applies with equal force to New York's good time release program. Unlike the good time scheme before this Court in *Wolff* v. *McDonnell, supra,* 418 U.S. 539, New York's system is not mandatory. It does not require the granting of good time credits for good behavior and performance of duties, nor does it allow withholding only for serious misconduct. See *Wolff,* 418 U.S. at 545 and n. 6. Rather, the allowance is not an automatic award but "may be granted" for good performance or progress; the allowance is discretionary with the Time Allowance Committee, as in the parole system. N.Y. Corr. Law § 803(1); 7 N.Y.C.R.R. §§ 260.3(b), 261.3(e); *Bradley* v. *Ward,* 81 Misc. 2d 713, 716, 366 N.Y.S. 2d 841, 844 (Sup. Ct. Albany Co. 1975); *People ex rel. Bright* v. *Ward,* 79 Misc. 2d 959, 962-964, 361 N.Y.S. 2d 809, 813-815 (Sup. Ct. Bronx Co. 1974).

Alternatively, if the possibility of an adverse parole decision is sufficient to implicate a liberty or property interest in the instant situation, it does not follow that a transfer is invalid unless preceded by due process guarantees; it would be sufficient to simply expunge the transfer notation from the records examined by the Board of Parole. See *Fano* v. *Meachum, supra,* 520 F. 2d at 382 (CAMPBELL, J., dissenting).

In any event, Haymes indeed has several avenues by which to ascertain why he was denied parole release in 1974 and 1975. In *Haymes* v. *Regan,* 74 Civ. 4150 (S.D.N.Y.), the same plaintiff, represented by counsel, filed an amended complaint challenging, *inter alia,* the failure of the Board of Parole to give him an adequate written statement of the reasons for his parole denial.* The District Court granted relief on this claim; its order required the state to provide Haymes with a written statement of the reasons for parole denial and the facts upon which the decision was based. Pursuant to this judicial order, in September and October, 1975, Haymes received such statements with regard to his parole denials in 1974 and 1975.** It is quite clear from those statements that the denials were based on his decidedly poor disciplinary record and institutional adjustment. Haymes' difficulty adjusting to prison life was not raised in that action only. In *Haymes* v. *Preiser,* 74 Civ. 4151 (S.D.N.Y.), Haymes filed a *pro se* complaint sworn to on August 27, 1974. In that complaint he averred that between May, 1974 and the date of the complaint he had "been charged with up to as many as one hundred institutional reports (charges) to which he has been required to appear

* Effective August, 1975 the Board was required by statute to provide such a statement. N.Y. Corr. Law § 214(6), L. 1975, c. 131, § 1.

** The District Court's opinion is reported at 394 F. Supp. 711. The Court's order and the statements provided to Haymes are on file with the Clerk of this Court.



before an institutional adjustment committee . . ." (at 5).*

4. Haymes complains that defendants do not recognize the liberty interests of a prison inmate except as may be created by statute (Res. Br. at 18). Certainly the range of values which constitute the liberty interests of free persons in society (see, e.g., *Roth, supra,* 408 U.S. at 572; *Meyer* v. *Nebraska,* 262 U.S. 390, 399 [1923]) have no application to a prisoner. By virtue of his conviction, a prisoner has been deprived of most of the activities which represent liberty to non-prisoners—the right to pursue an occupation, establish a home, choose his residence, and control his living conditions. Accordingly, a prisoner's interest in the location of the prison where he resides can not be found in constitutional concepts of liberty but only in the statutes and regulations of the state. Defendants have already shown that an inmate has no legitimate claim of entitlement to placement or retention in a particular prison (Pet. Br. at 7-10). So long as his placement does not violate any constitutional mandate, such as the prohibition against cruel and unusual punishment, it is certainly accurate in the context of this case to say that an inmate has no independent liberty interest; absent some statutory entitlement to his retention at a particular prison, Haymes has no interest protected by the Fourteenth Amendment.

As Judge Campbell stated in his cogent dissent in *Fano* v. *Meachum, supra,* 520 F. 2d at 381:

> "Still, even in defining a prisoner's 'liberty' interest, one must ask not only whether a particular event may cause loss to the prisoner but whether one in the position has any claim to what was taken away.[2] Prisoners are by definition, prisoners. Changes in the condi-

* The complaint in that case is on file with this Court. Defendants' motion to dismiss is *sub judice;* Haymes is now represented by counsel.

tions of confinement, whether involving a different cell assignment, a new meal schedule, or a transfer to a new facility, seem to me to fall within the state's general right to confine, safeguard, and rehabilitate. To treat them as 'liberties' belonging to the inmate invites greater interference with the management of prisons than seems either wise or constitutionally mandated.

Where within the state penal system a prisoner is to be lodged seems to me a judgment which the state has the exclusive right to make—summarily if need be. Such decisions are part and parcel of its power to keep the prisoner safely, to protect other prisoners, and to operate its prisons. State penal institutions normally consist of more than one institution. Indeed large states may have dozens of such institutions. Administrators must decide where best to place inmates. They must consider available space and facilities and which programs are best suited to which inmates . . . [P]risoners are involuntary inhabitants and some are dangerous and unpredictable . . . I do not think the realities of the state-prisoner relationship admit to classifying such decisions, when relating to a transfer, as a liberty interest of the prisoner. Penal authorities will perhaps think it best to afford safeguards but I do not think the Constitution can reasonably be said to require them.

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[2] A civil servant sent to Alaska, a soldier sent to Vietnam, or a prisoner sent to another institution may, in a private sense, suffer 'grievous loss', but the nature of the organization and of their role precludes acknowledging any 'liberty' or 'property' right to remain in one location. Notwithstanding language in *Morrissey* v. *Brewer*, 408 U.S. 471, 481-84 (1972), cautioning against distinctions based on 'privileges' as opposed to 'rights', it is necessary to consider not only whether what happens causes subjective loss to the individual, but whether he has a right to any protection against that loss."



## CONCLUSION

**For the foregoing reasons, the decision below should be reversed.**

Dated: New York, New York, April 13, 1976.

Respectfully submitted,

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